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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 WAYNE R. LAKE, et al.,

11 Plaintiffs,

12 v.

13 MTC FINANCIAL, INC., et al.,

14 Defendants.

CASE NO. C16-1482JLR

ORDER GRANTING MOTION
TO DISMISS

15 I. INTRODUCTION

16 Before the court is Defendant Deutsche Bank Trust Company Americas as
17 Trustee for the Certificate Holders of Dover Mortgage Holder Capital 2005-A
18 Corporation Grantor Trust Certificate, Series 2005-A's ("Deutsche Bank") motion to
19 dismiss Plaintiffs Wayne R. and Cynthia A. Lake's (collectively, "the Lakes") complaint.
20 (Mot. (Dkt. # 8).) The Lakes, who are proceeding *pro se*, did not respond to the motion

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1 to dismiss.¹ (*See generally* Dkt.) The court has considered the motion, the relevant
2 portions of the record, and the applicable law. Being fully advised,² the court GRANTS
3 Deutsche Bank's motion for the reasons set forth below.

4 II. BACKGROUND

5 This case arises from the sale of the Lakes' home in foreclosure. (Compl. (Dkt.
6 # 1) at 2.) On October 11, 2002, the Lakes signed a deed of trust for \$145,000.00, which
7 was recorded against the Lakes' residence in Lake Forest Park, Washington. (*Id.*) The
8 deed of trust secured a promissory note that was payable to Bank of America, N.A. (*See*
9 *id.* at 9.) The complaint alleges that "[a]n assignment of the trust deed and note was
10 purportedly executed on May 4th 2010 . . . in which the document purports to assign the
11 note and trust deed to the defendant," Deutsche Bank. (*Id.*) The Lakes allege that the
12 original lender, Bank of America, N.A., has nevertheless continued to "express the same
13 interest as it had before the purported assignment." (*Id.*)

14 On October 29, 2015, Defendant MTC Financial, Inc. dba Trustee Corps ("MTC")
15 recorded a Notice of Trustee's Sale, which scheduled a sale for March 11, 2016.
16 (Gibbons Decl. (Dkt. # 9) ¶ 6, Ex. D; Compl., Ex. A at 37.) After the March sale did not
17 occur, MTC recorded a second Notice of Trustee's Sale on May 24, 2016, which set

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19 ¹ On January 10, 2017, the Lakes filed a motion to strike Deutsche Bank's appearance
20 and motion to dismiss. (Mot. to Strike (Dkt. # 13).) Even if the court liberally construes the
21 Lakes' motion to strike as a response to Deutsche Bank's motion to dismiss, it would be
untimely under Local Rule 7(d)(3). *See* Local Rules W.D. Wash. LCR 7(d)(3). In any event, the
Lakes' motion to strike does not address Deutsche Bank's arguments in its motion to dismiss.
The court denied the Lakes' motion to strike on March 3, 2017. (3/3/17 Order (Dkt. # 15).)

22 ² No party has requested oral argument, and the court deems it unnecessary to the
disposition of this motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

1 September 23, 2016, as the date for the sale. (Gibbons Decl. ¶ 7, Ex. E; Compl., Ex. A at
2 25.) After the September sale did not occur, MTC signed a third Notice of Trustee's
3 Sale, which was dated August 8, 2016, and scheduled a sale for December 16, 2016.³
4 (Compl., Ex. A at 19.) The record does not indicate whether the sale scheduled for
5 December 16, 2016, occurred.

6 The Lakes also allege that on or about April 1, 2016, Deutsche Bank entered into a
7 "License Agreement" with them and agreed to purge its records and databases of any and
8 all information pertaining to the Lakes. (Compl. at 17.) The Lakes attach a copy of the
9 alleged "License Agreement" as an exhibit to their complaint. (*See id.*, Ex. B.)

10 On September 20, 2016, the Lakes filed this *pro se* lawsuit against MTC, Deutsche
11 Bank, and Defendant Regional Trustee Services Corporation ("RTSC"). (*See generally*
12 Compl.) In their complaint, the Lakes allege that Deutsche Bank violated the Fair Debt
13 Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and breached the alleged
14 "Licensing Agreement." (*Id.* at 13, 17.) On November 14, 2016, Deutsche Bank filed
15 a motion to dismiss the Lakes' complaint (*see generally* Mot.) to which the Lakes did not
16 respond⁴ (*see generally* Dkt.). The court now addresses Deutsche Bank's motion.

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18 ³ This notice of sale was recorded on August 10, 2016. *See* King County Recorder's
19 Office, <http://www.kingcounty.gov/depts/records-licensing/recorders-office/records-search.aspx>
20 (click "begin search" link; then follow Official Public Records Search link; then enter Lakes'
21 information) (last visited Mar. 31, 2017); *see also* Fed. R. Evid. 201(c)(1) ("The court . . . may
22 take judicial notice on its own."); *Michery v. Ford Motor Co.*, 650 F. App'x 338, 342 (9th Cir.
2016) (granting a motion for judicial notice of documents located on a government website);
Paralyzed Veterans of Am. v. McPherson, No. C064670SBA, 2008 WL 4183981, at *5 (N.D.
Cal. Sept. 9, 2008) ("[I]nformation on government agency websites . . . [has] often been treated
as proper subjects for judicial notice.").

⁴ *See supra* note 1.

III. ANALYSIS

A. Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wylar Summit P'ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). A court may dismiss a complaint as a matter of law if it lacks a cognizable legal theory or states insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

The court need not accept as true a legal conclusion presented as a factual allegation. *Iqbal*, 556 U.S. at 678. Although the pleading standard of Federal Rule of Civil Procedure 8 does not require "detailed factual allegations," it demands more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555). A pleading that offers only "labels and conclusions or a formulaic recitation of the elements of a cause of action" will not survive a motion to dismiss under Rule 12(b)(6). *Id.*

1 **B. Documents the Court Considers**

2 Generally, a district court may not consider material beyond the complaint in
3 ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th
4 Cir. 2001). The Ninth Circuit, however, has carved out limited exceptions to this rule.
5 First, a court may consider material properly submitted as a part of the complaint. *Id.*
6 Second, a court may consider documents not physically attached to the pleading if the
7 contents are alleged in the complaint and no party questions the authenticity. *Id.* Third,
8 under Federal Rule of Evidence 201, a court may take judicial notice matters of public
9 record. *Id.* at 688-89. Rule 201 provides, in pertinent part, “[a] judicially noticed fact
10 must be one not subject to reasonable dispute in that it is . . . capable of accurate and
11 ready determination by resort to sources whose accuracy cannot reasonably be
12 questioned.” Fed. R. Evid. 201(b)(2). “A trial court may presume that public records are
13 authentic and trustworthy,” *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir.
14 1999), and thus, fall within the purview of Rule 201, *see also Allshouse v. Caliber Home*
15 *Loans, Inc.*, No. CV1401287DMGJCX, 2014 WL 12594210, at *3 (C.D. Cal. Oct. 29,
16 2014) (“Courts routinely take judicial notice of assignments of deed of trust and similar
17 recorded documents” in motions to dismiss.).

18 Based on the foregoing authority, the court may consider the documents the Lakes
19 attach to their complaint. *Lee*, 250 F.3d at 688. Thus, the court considers the Notices of
20 Trustee’s Sales (Compl., Ex. A at 19, 25, 37), the original deed of trust (*id.* at 15), and the
21 communications sent from Bank of America, N.A. to the Lakes (*id.* at 134, 137, 140,
22 143). The court also considers the “License Agreement.” (Compl., Ex. B.)

1 In addition, Deutsche Bank asks the court to take judicial notice of the assignment
2 of the deed of trust from Bank of America, N.A. to Deutsche Bank and the appointment
3 of ReconTrust Company N.A., as the successor trustee, both of which have been recorded
4 with the King County Recorder's Office. (Mot. at 6; *see also* Gibbons Decl. ¶¶ 3-4, Exs.
5 A-B.) Deutsche Bank further requests notice of the appointment of successor trustee to
6 MTC on July 2, 2015, which was also recorded with the King County Recorder's Office.
7 (Mot. at 6; *see also* Gibbons Decl. ¶ 5, Ex. C.)

8 The Lakes did not respond to Deutsche Bank's request for judicial notice. (*See*
9 *generally* Dkt.) Although the Lakes allege in their complaint that the "defendant
10 delivered to the plaintiff written communications that were made to look like or falsely
11 represent documents authorized, issued, or approved by a court, official, or agency of the
12 United States" (Compl. at 12),⁵ this allegation does not overcome the presumption that
13 public records are authentic and trustworthy, *Gilbrook*, 177 F.3d at 858. Indeed, the
14 court does not need to accept as true the Lakes' allegation that the documents were false
15 or fraudulent because the allegation is a legal conclusion, and the Lakes did not allege
16 sufficient facts from which the court could reasonably infer that the documents were false
17 or fraudulent. *Iqbal*, 556 U.S. at 678. Thus, the court grants Deutsche Bank's request for
18 judicial notice.

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20 ⁵ (*See also* Compl. at 12 ("[D]efendant has falsely represented that it does have
21 certain legal rights under the trust deed, and it has the right to foreclose of [sic] the
22 plaintiff fails or refuses to provide more credit, banking, financial, personal or other
identifying information along with agreeing to making regular payments of money to the
defendant or its privies").)

1 **C. Motion to Dismiss**

2 The Lakes allege claims based on violations of the FDCPA and breach of contract.
3 (*See generally* Compl.) Deutsche Bank moves for the dismissal of all of the Lakes'
4 claims.⁶ (*See* Mot.)

5 1. FDCPA Claim

6 Deutsche Bank argues that the Lakes' FDCPA claim should be dismissed on a
7 number of grounds, including that (1) the Lakes lack of standing to challenge the
8 assignment of the deed of trust (Mot. at 9), (2) the FDCPA does not apply to the
9 foreclosure process (*id.* at 10), and (3) Deutsche Bank is not a "debt collector" as defined
10 by the FDCPA (*id.* at 11). The court addresses each argument in turn.⁷

11 *a. Standing*

12 Deutsche Bank moves to dismiss the Lakes' FDCPA claim because the Lakes lack
13 standing to challenge the assignment of the deed of trust. (Mot. at 9.) "It is well
14 established that 'a borrower generally lacks standing to challenge the assignment of its
15 loan documents unless the borrower shows that it is at a genuine risk of paying the same

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17 ⁶ Deutsche Bank argues that the Lakes' bankruptcy does not preclude the court's
18 consideration of this motion to dismiss. (Reply (Dkt. # 12) at 2.) The court agrees. The
19 automatic stay under the Bankruptcy Code "does not prevent . . . a defendant from protecting its
20 interests against claims brought by the debtor." *In re Palmdale Hills Prop., LLC*, 654 F.3d 868,
21 875 (9th Cir. 2011). The automatic stay applies only to actions "against the debtor." *See* 11
22 U.S.C. § 362(a)(1) (stating that a bankruptcy petition "operates as a stay . . . of . . . the
commencement or continuation . . . of a judicial . . . action against the debtor . . ."). Further,
there is "no policy of preventing persons whom the bankrupt has sued from protecting their legal
rights." *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir.
1989).

⁷ Although each of Deutsche Banks' arguments provide an independent ground for
dismissal of the FDCPA claim, the court analyzes each argument. *See infra* § III. C.1. a-c.

1 debt twice.” *Hummel v. Nw. Tr. Servs., Inc.*, 180 F. Supp. 3d 798, 806 (W.D. Wash.
2 2016) (quoting *Andrews v. Countrywide Bank, NA*, 95 F. Supp. 3d 1298, 1301-02 (W.D.
3 Wash. 2015), *reconsideration denied*, No. C15-0428JLR, 2015 WL 12085856 (W.D.
4 Wash. Apr. 7, 2015)). Borrowers, as third parties to an assignment, cannot challenge the
5 chain of assignments. *Borowski v. BNC Mortg., Inc.*, No. C12-5867RJB, 2013 WL
6 4522253, at *5 (W.D. Wash. Aug. 27, 2013).

7 In this case, the Lakes have not alleged that they are at risk of paying the same
8 debt twice. (*See generally* Compl.) Although the Lakes allege that Bank of America,
9 N.A. “has continued to express the same interests as it had before” (Compl. at 9), an
10 exhibit to their complaint contradicts that allegation, (Compl., Ex. A at 134, 137, 140,
11 143 (explaining that Bank of America, N.A. is only the loan servicer and that Deutsche
12 Bank is the noteholder)). The court is “not . . . required to accept as true allegations that
13 contradict exhibits attached to the Complaint.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
14 F.3d 992, 998 (9th Cir. 2010). Accordingly, the court concludes that the Lakes are barred
15 from alleging the ineffectiveness or illegitimacy of the assignments at issue because they
16 lack standing to do so, and the court grants Deutsche Bank’s motion to dismiss the Lakes’
17 FDCPA claim on this ground.

18 *b. Debt Collection*

19 The Lakes allege in their complaint that Deutsche Bank violated the FDCPA by
20 “utilizing the statutory foreclosure process for this state for the purpose of engaging in a
21 scheme that aims to conceal the identity, sources, and destination of illicitly-obtained
22 money.” (Compl. at 11.) They also allege that Deutsche Bank violated the FDCPA when

1 the “defendant threatened to undertake a foreclosure action against the plaintiff.” (*Id.* at
2 12.) Deutsche Bank argues that the court should dismiss the Lakes’ FDCPA claim
3 because the FDCPA does not apply to foreclosures. (Mot. at 10.)

4 “The FDCPA imposes liability only when an entity is attempting to collect debt.
5 For the purposes of the FDCPA, the word ‘debt’ is synonymous with ‘money.’” *Ho v.*
6 *ReconTrust Co., NA*, 840 F.3d 618, 621 (9th Cir. 2016) (citing 15 U.S.C. §§ 1692a(5),
7 1692(e)). The object of foreclosure, however, is to retake and resell a security, not to
8 collect money. *Id.* Indeed, ““foreclosing on a deed of trust is an entirely different path’
9 than ‘collecting funds from a debtor.’” *Id.* at 621 (quoting *Hulse v. Ocwen Fed. Bank*,
10 195 F. Supp. 2d 1188, 1204 (D. Or. 2002)). Thus, the FDCPA applies to foreclosure
11 activities only through the limited provisions of Section 1692f(6). *See Mashiri v. Epstein*
12 *Grinnell & Howell*, 845 F.3d 984, 990 (9th Cir. 2017) (“[W]here an entity is engaged
13 solely in the enforcement of a security interest and not in debt collection . . . it is subject
14 only to § 1692f(6) rather than the full scope of the FDCPA.”).

15 Section 1692f(6) prohibits, in pertinent part, the “[t]aking or threatening to take
16 any nonjudicial action to effect dispossession or disablement of property if . . . there is no
17 present right to possession of the property claimed as collateral through an enforceable
18 security interest.” 15 U.S.C. § 1692f(6)(A); *see Ho*, 840 F.3d at 622. The Lakes fail to
19 allege facts that bring Deutsche Bank’s foreclosure action within the narrow provisions of
20 Section 1692f(6). Specifically, the Lakes fail to allege facts from which the court can
21 reasonably infer that Deutsche Bank did not have a present right to possession of the
22 property at issue. Although the Lakes allege that the documents Deutsche Bank sent

1 | them were fraudulent (Compl. at 12), this allegation is a legal conclusion, which the court
2 | need not accept as true, *Iqbal*, 556 U.S. at 678. Additionally, the court can consider the
3 | Lakes' exhibits and has judicially noticed the assignment of the deed of trust. *See supra*
4 | § III.B. These documents, on their face, demonstrate that Deutsche Bank has a present
5 | right to possession of the property claimed as collateral through an enforceable security
6 | interest. (*See* Gibbons Decl. at Exs. A-C; Compl., Ex. A at 19, 25, 37.) Consequently,
7 | the court cannot reasonably infer Deutsche Bank's foreclosure actions to be within the
8 | provisions of Section 1692f(6), and dismisses the Lakes' FDCPA claim on this basis.

9 | *c. Debt Collector*

10 | The Lakes allege that Deutsche Bank committed violations of Sections 1692e(4)
11 | and (5) and of Sections 1692g(a) and (b) of the FDCPA. (Compl. at 13.) These FDCPA
12 | provisions apply to "debt collectors." *See* 15 U.S.C. §§ 1692e(4)-(5); 1692g(a)-(b).
13 | Deutsche Bank argues that the court should dismiss the Lakes' FDCPA claim because it
14 | is not a "debt collector" under the statute, and therefore its actions are not covered by
15 | these provisions. (Mot. at 11.)

16 | To state a claim under the FDCPA, the Lakes' must allege sufficient "factual
17 | content that allows the court to draw the reasonable inference" that Deutsche Bank is a
18 | debt collector as defined in the statute. *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d
19 | 1204, 1208 (9th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). The FDCPA defines "debt
20 | collector" as:

21 | Any person who uses any instrumentality of interstate commerce or the mails
22 | in any business the principal purpose of which is the collection of any debts,
or who regularly collects or attempts to collect, directly or indirectly, debts

1 owed or due or asserted to be owed or due another.

2 15 U.S.C. § 1692a(6); *see also Schlegel*, 720 F.3d at 1208 (“The FDCPA defines the
3 phrase ‘debt collector’ to include: (1) ‘any person who uses any instrumentality of
4 interstate commerce or the mails in any business the principal purpose of which is the
5 collection of any debts,’ and (2) any person ‘who regularly collects or attempts to collect,
6 directly or indirectly, debts owed or due or asserted to be owed or due another.’”). Thus,
7 to adequately allege that Deutsche Bank is a “debt collector,” the Lakes must allege
8 sufficient facts from which the court can reasonably infer that (1) Deutsche Bank’s
9 “principal purpose” is debt collection, or (2) Deutsche Bank “regularly collects debts
10 owed to someone other than [Deutsche Bank].” *Id.* at 1209.

11 The Lakes do not adequately allege that Deutsche Bank is a debt collector. The
12 Lakes’ allegation that “Defendant is a debt collector as defined in Title 15 U.S.C.
13 § 1692(a) of the [FDCPA]” is a legal conclusion that the court need not accept as true.
14 (Compl. at 8); *see also Iqbal*, 556 U.S. at 678. The Lakes also allege that Deutsche Bank
15 began sending written communication to the plaintiff stating that it was
16 representing various parties having rights under the same trust deed, or at
17 least plaintiff understood that it was representing parties, including other
18 defendants, the trustee, a bank, a law firm, etc. who were all claiming some
19 rights in the plaintiff’s property.

20 (Compl. at 10.) The court cannot reasonably infer from these allegations that Deutsche
21 Bank’s principal purpose is debt collection or that Deutsche Bank regularly collects debts
22 owed to a third party. Accordingly, the court dismisses the Lakes’ FDCPA claim on this
23 ground.

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1 2. Contract Claim

2 The Lakes allege that Deutsche Bank entered into a “license agreement” with them
3 on or about April 1, 2016. (Compl. at 16.) They claim that Deutsche Bank entered the
4 agreement when it “failed to comply with the ‘opt-out’ provisions that would have
5 excluded [Deutsche Bank] from the obligations under the license agreement.” (*Id.* at 17.)
6 The Lakes also allege that the contract obligated Deutsche Bank to “purge its records and
7 databases of any and all information pertaining to the plaintiff and/or provide a certificate
8 of destruction of any records or information it could not return.” (*Id.*) Deutsche Bank
9 argues that the court should dismiss the Lakes’ breach of contract claim because the
10 Lakes failed to plead the existence of a valid contract. (Mot. at 13.)

11 For a contract to exist, there must be mutual assent, which “generally takes the
12 form of offer and acceptance.” *Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of*
13 *Yakima*, 858 P.2d 245, 256 (Wash. 1993). A contract is not valid until an offer has been
14 accepted. *A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist. No. 303*, 491 P.2d 684, 686
15 (Wash. Ct. App. 1971). Moreover, “[f]ailure to reject an offer is not equivalent to assent
16 of that contract since silence is acceptance only where there is a duty to speak.”

17 *Saluteen-Maschersky v. Countrywide Funding Corp.*, 22 P.3d 804, 808 (Wash. Ct. App.
18 2001). Finally, “a duty to speak arises only out of a trust or fiduciary relationship
19 between the parties.” *Lincoln v. Keene*, 316 P.2d 899, 901 (Wash. 1957); *Bain v. Metro.*
20 *Mortg. Grp., Inc.*, 285 P.3d 34, 39 (Wash. 2012) (Under Washington law, trustees do not
21 have a fiduciary duty to the grantor or other persons having an interest in the property.);
22 *Miller v. U.S. Bank of Wash., N.A.*, 865 P.2d 536, 543 (Wash. Ct. App. 1994), *as*

1 corrected (Feb. 22, 1994) ("The general rule in Washington is that a lender is not a
2 fiduciary of its borrower.").

3 In this case, the Lakes do not claim that Deutsche Bank affirmatively agreed to
4 enter into the license agreement. (*See generally* Compl.) The Lakes merely allege that
5 the "defendant has failed to comply with the 'opt-out' provisions" which the Lakes
6 contend obligated Deutsche Bank to follow the terms of the agreement. (*Id.* at 17.) The
7 Lakes' bare assertion that Deutsche Bank failed to comply with the opt-out provision is
8 insufficient to create a contract as a matter of law. The Lakes fail to allege that Deutsche
9 Bank had a duty to speak and, consequently, Deutsche Bank's alleged silence or "failure
10 to comply with the 'opt-out' provisions" was not an acceptance of the agreement. (*See*
11 *generally* Compl.; *see also* Compl., Ex. B at 7.) Because the Lakes fail to allege the
12 formation of a contract, the court grants Deutsche Bank's motion to dismiss the Lakes'
13 contract claim.⁸

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16 ⁸ Deutsche Bank also argues that the court should dismiss the contract claim because the
17 Lakes fail to allege breach or damages. (Mot. at 16-17.) In their complaint, the Lakes allege that
18 the "defendant has failed to comply . . . [and] is currently in breach." (Compl. at 17.) The Lakes
19 also allege that the "defendant is liable to the plaintiff for liquidated damages as set forth in the
20 agreement." (*Id.* at 15.) The court, however, need not accept these conclusory allegations as
21 true. *Iqbal*, 556 U.S. at 678. A breach of contract is actionable only if the contract imposes a
22 duty, the duty is breached, and the breach proximately causes damage to the claimant. *Nw.*
Indep. Forest Mfrs. v. Dep't of Labor & Indus., 899 P.2d 6, 9 (Wash. Ct. App. 1995). In order to
claim liquidated damages, "the amount fixed must be a reasonable forecast of just compensation
for the harm that is caused by the breach . . . [and] the harm must be such that it is incapable or
very difficult of ascertainment." *Walter Implement, Inc. v. Focht*, 730 P.2d 1340, 1343 (Wash.
1987). These additional pleading deficiencies are independent grounds for dismissal of the
Lakes' contract claim.

1 **D. Application of Motion to Dismiss to MTC Financial**

2 MTC did not join in Deutsche Bank's motion to dismiss. (*See generally* Dkt.)
3 Nevertheless, the Lakes' allegations against MTC are virtually identical to their
4 allegations against Deutsche Bank.⁹

5 A court may dismiss a claim *sua sponte* under Federal Rule of Civil Procedure
6 12(b)(6). *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987). A trial court
7 "may act on its own initiative to note the inadequacy of a complaint and dismiss it for
8 failure to state a claim." *Wong v. Bell*, 642 F.2d 359, 361 (9th Cir. 1981). Generally, the
9 court must give notice of its *sua sponte* intention to dismiss and provide plaintiffs "an
10 opportunity to at least submit a written memorandum in opposition to such motion."
11 *Crawford v. Bell*, 599 F.2d 890, 893 (9th Cir. 1979). However, "[s]uch a dismissal may
12 be made without notice where the claimant cannot possibly win relief." *Omar*, 813 F.2d
13 at 991; *Wong*, 642 F.2d at 362. A court may also grant a motion to dismiss as to
14 non-moving defendants where the non-moving defendants are in a "position similar to
15 that of moving defendants or where the claims against all defendants are integrally
16 related." *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 162 (7th Cir.1993). Because the
17 allegations against Deutsche Bank and MTC are virtually identical, the court *sua sponte*
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20 ⁹ The claims are not completely identical because the Lakes make a claim against
21 Deutsche Bank that they do not make against MTC (*see e.g.*, Compl. at 9 (alleging that Deutsche
22 Bank is a "nonperson" without rights to own property)), as well as a claim against MTC not
 made against Deutsche Bank (*see* Compl. at 3 (alleging MTC sent the Lakes a notice stating it
 was "communication from a debt collector" and demanding payment on the "trust deed")). The
 court does not accept this additional allegation against MTC as true, however, because the
 Lakes' exhibit contradicts this allegation. (Compl., Ex. A at 25); *Daniels-Hall*, 629 F.3d at 998.

1 dismisses the Lakes' claims against MTC on the same grounds as the court dismisses the
2 Lakes' claims against Deutsche Bank.

3 **E. Leave to Amend**

4 Federal Rule of Civil Procedure 15 states that "the court should freely give leave
5 [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). In order to
6 determine whether justice requires leave to amend, the court considers: (1) the presence
7 or absence of undue delay, (2) bad faith, (3) dilatory motive, (4) "repeated failure to cure
8 deficiencies" in previous amendments, and (5) futility of the amendment. *Moore v.*
9 *Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*,
10 371 U.S. 178, 181, 183 (1962)). "Unless it is absolutely clear that no amendment can
11 cure the defect . . . a pro se litigant is entitled to notice of the complaint's deficiencies and
12 an opportunity to amend prior to dismissal of the action." *Garity v. APWU Nat'l Labor*
13 *Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (quoting *Lucas v. Dep't of Corr.*, 66 F.3d 245,
14 248 (9th Cir. 1995)).

15 In this case, the court will grant the Lakes leave to amend their FDCPA claim.
16 Since Section 1692f(6) of the FDCPA offers limited protection against foreclosure
17 activity, it is not "absolutely clear" that the Lakes could offer no amendment to cure the
18 deficiencies in their complaint with respect to this provision of the FDCPA. *See Garity*,
19 828 F.3d at 854.

20 The court, however, denies leave to amend the Lakes' breach of contract claim.
21 The Lakes have already alleged that Deutsche Bank entered into the license agreement by
22 failing to exercise an "opt-out" provision. (Compl. at 17.) Leave to amend is futile

1 because the Lakes cannot contradict the allegations in the original complaint by alleging
2 a different form of acceptance by Deutsche Bank. *United States v. Corinthian Colleges*,
3 655 F.3d 984, 995 (9th Cir. 2011) (“Leave to amend is warranted if the deficiencies can
4 be cured with additional allegations that are ‘consistent with the challenged pleading’ and
5 that do not contradict the allegations in the original complaint.”).

6 **F. Service of Process to Regional Trustee Services Corporation**

7 Although the parties do not raise the issue, the court notes that there is no evidence
8 in the record that the Lakes have served RTSC. (*See generally* Dkt.) Federal Rule of
9 Civil Procedure 4 requires plaintiffs to serve defendants with a summons and a copy of
10 the plaintiff’s complaint and sets forth the specific requirements for doing so. *See* Fed. R.
11 Civ. P. 4. Rule 4(m), which provides the timeframe in which service must be effectuated,
12 states in relevant part:

13 If a defendant is not served within 90 days after the complaint is filed, the
14 court—on motion or on its own after notice to the plaintiff—must dismiss
15 the action without prejudice against that defendant or order that service be
made within a specified time. But if the plaintiff shows good cause for the
failure, the court must extend the time for service for an appropriate period.

16 Fed. R. Civ. P. 4(m); *see also* Fed. R. Civ. P. 4(l) (stating requirement of proving
17 service).

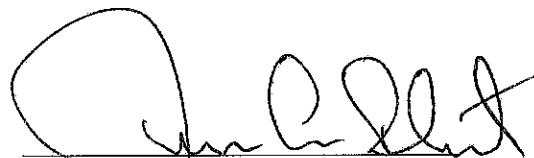
18 The Lakes filed their complaint on September 20, 2016. (Compl. at 1.) However,
19 there is no indication in the record that the Lakes served RTSC with the summons and the
20 complaint within the time period provided by Rule 4(m). (*See generally* Dkt.) The court
21 orders the Lakes to show cause within 20 days of the entry of this order why their claims
22 against RTSC should not be dismissed for failure to comply with Rule 4(m). If the Lakes

1 fail to show good cause, then the court will dismiss their claims against RTSC without
2 prejudice.

3 **IV. CONCLUSION**

4 For the reasons set forth in this order, the court GRANTS Deutsche Bank's motion
5 to dismiss (Dkt. # 8). The court also GRANTS the Lakes leave to amend their complaint
6 with respect to their FDCPA claim. The court, however, DENIES the Lakes leave to
7 amend their contract claim. The Lakes must file their amended complaint, if any, within
8 twenty (20) days of the filing date of this order. The court further ORDERS the Lakes to
9 SHOW CAUSE within twenty (20) days of the entry of this order why their claims
10 against RTSC should not be dismissed for failure to comply with Rule 4(m). The Lakes
11 should file their amended complaint, if any, and response to the court's order to show
12 cause separately.

13 Dated this th11 day of April, 2017.



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15 JAMES L. ROBART
United States District Judge
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